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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1929.

No. 60.

The Railroad Commission of the State of California, and the City of Los Angeles, a municipal corporation,
Appellants,

vs.

Los Angeles Railway Corporation, a corporation,
Appellee.

BRIEF ON BEHALF OF APPELLANT, CITY OF LOS ANGELES.

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BRIEF ON BEHALF OF APPELLANT, CITY OF LOS ANGELES.

This case was brought to this court on direct appeal from an opinion and decree allowing permanent injunction issued by the District Court of the United States, in and for the Southern District of California, Southern Division, three judges sitting, pursuant to proceedings had under United States Code, title 28, section 380 (formerly Judicial Code, section 266). Direct appeal from said decree allowing a permanent injunction is expressly authorized by said section of the United States Code.

The opinion of the court is officially reported in 29 Federal Reporter (2nd Series), pages 140-148, and appears in the printed record herein at pages 534-549. The decree allowing injunction and injunction appear in the printed record at pages 559-562 and 563-566, respectively.

Pursuant to paragraph one of rule 12 of this court appellant Railroad Commission of California and appellant City of Los Angeles duly fixed herein their statement as to the basis on which it is contended that this court has jurisdiction to review the opinion and decree herein.

Pursuant to paragraph 9 of rule 13 of this court said appellants duly filed herein a statement of points on which they intend to rely on this appeal [R. 580].

STATEMENT OF THE CASE.

The Los Angeles Railway Corporation, appellee herein, operates its street railway system in the City of Los Angeles under and pursuant to 114 franchises granted to said Company and its predecessor companies by the cities of Los Angeles, Vernon and Huntington Park, and the county of Los Angeles.

The franchises in question were granted between the years 1886 and 1927—all for terms of years varying between 21 and 50 years; four were granted between 1886 and 1891; forty-eight were granted between 1891 and 1905; twenty between 1905 and 1911; seven between 1911 and 1914; and twenty-three between 1914 and 1927 [R. 394 *et seq.*]. There are one hundred and two of these franchises granted now effective, and the summary of their classification [R. 387-388] shows that eighteen were of Class "A," providing that the rate of fare

> "shall not be more than five cents for one continuous ride in the same general direction within the corporate limits of the city, except upon a showing before a competent authority having jurisdiction over rates of fare that such greater charge is justified;"

that there were seventy-three franchises under Class "B," providing

> "that the rate of fare for any distance over said road or its branches, one way, shall not exceed five cents for one passenger;"

that there were five franchises under Class "C," in which no provision was made for any rate of fare; that there were three franchises under Class "D," providing

> "that the rates of fare charged shall not exceed two and one-half cents per mile for any distance, provided, however, that no fare need be less than five cents;"

that there were two franchises under Class "E," providing

> "that the rate of fare for passengers on said railroad shall never exceed ten cents, the said board of supervisors reserving the right to establish at any time a fare not exceeding ten cents and not less than five cents;"

that under Class "F" there was one franchise, providing

> "that the rate of fare for passengers on said railroad shall never exceed three cents per mile."

Certain of these franchises had been granted by the county of Los Angeles prior to the time the territory involved had become annexed to the City [R. 388-396]. Seventy-nine franchises had been granted prior to 1914.

On November 17, 1926, the Railway Company filed with the State Railroad Commission an application for an in-

crease in its rates, as fixed in the various franchises above mentioned, to a basic fare of seven cents cash, or four single-fare tokens for twenty-five cents [R. 75-110]. The Commission, after an exhaustive investigation thereon, on March 26, 1928, issued its Opinion and Order No. 19,521, denying the said application for rate increase [R. 165-175].

The order, in part, provided [R. 168]:

> "It is hereby ordered that the application of the Los Angeles Railway Corporation for increase of its rates of fare in the above-entitled proceeding be, and the same is hereby, denied."

The said rates of fare were the rates of fare governed by the franchises in question, and no change had ever been made by the State Railroad Commission in the franchise rates, although in May, 1921, the Commission had made a permissive order permitting the company to charge six cents, which never became effective.

The 1921 order is not pleaded as such a change by appellee, plaintiff below, nor was it introduced in evidence in the court below. The only reference to it in the record is found in allegation IV of the amended complaint [R. 12]; in the concurring opinion of Commissioner Carr in the 1928 decision and order (No. 19,521) [R. 169]; and in the order dismissing the said application, dated October 25, 1926, setting aside and revoking, at the request of the Railway Company, Decision No. 9029 [R. 349].

We shall discuss this point at length later under its appropriate heading, so for that reason the pleading and evidence are not set forth in full.

On June 22, 1928, the Railway Company filed with the District Court of the United States, in and for the Southern District of California, Southern Division, its bill of complaint against the Railroad Commission of California. Said bill of complaint was amended on June 28, 1928, and sets forth two alleged causes of action [R. 8-234]. By its first cause of action the Company sought to have the court declare confiscatory the five-cent rate of fare which it was permitted to charge under the various franchises granted to it [R. 8-53]; by its second cause of action the Company sought to have declared arbitrary and void the order of the Railroad Commission of California of 1928 (No. 19,521) refusing to increase the basic five-cent rate of fare, on the ground that the Commission did not consider all of the evidence before it and did not make its order with due consideration of the evidence presented to it [R. 53-74]. The City of Los Angeles, on motion duly made, was permitted to intervene in said proceeding as a party-defendant.

Thereafter the said three-judge court, constituted as provided by United States Code, title 28, section 380, issued its opinion [R. 534-549], and on October 1, 1928, issued its decree allowing permanent injunction [R. 559-566]. The court found the basic five-cent fare fixed in the franchises of plaintiff to be confiscatory, and held the order of the Railroad Commission denying the rate increase to be void. As a condition of the injunction the court in its decree authorized plaintiff, from and after the entry of the injunction and until final determination of the cause by the United States Supreme Court, to charge and collect not in excess of a basic fare of seven cents, or four single-fare tokens for twenty-five cents, all as prayed for

in the amended bill of complaint of plaintiff, and directed that plaintiff issue to each passenger paying such fares a refund ticket or coupon for the excess between the former five-cent fare and the rate of fare paid by such passenger [R. 565], pending final determination of the matter by this court.

Specification of Assigned Errors to Be Urged.

Appellant City of Los Angeles urges on this appeal the assignment of errors numbered I to XIV, inclusive [R. 569-572]. The said assignment of errors so specified are as follows:

I.

The court erred in making the decree.

II.

The court erred in granting the injunction.

III.

The court erred in making the decree and in overruling the respective motions to dismiss interposed by defendant Railroad Commission and intervener-defendant City of Los Angeles, for the reason that the relief asked in the amended bill of complaint herein is beyond the power and jurisdiction of the said court to grant.

IV.

The court erred in making the decree and in holding that the allegations of the first alleged cause of action in said amended bill of complaint stated a cause of action or raised any federal question over which it had or has jurisdiction, for the reason that said alleged cause of action attacks only the present effective rates of fare in force upon plaintiff's street railway system and fixed in the franchises sold to plaintiff by the City, and does not attack any order or act of the Railroad

Commission fixing any fare or fares to be charged by plaintiff.

V.

The court erred in making the decree and in holding that the allegations of the second alleged cause of action in said amended bill of complaint stated a cause of action or raised any federal question over which it had jurisdiction, for the reason that the said alleged cause of action does not attack any order or act of the Railroad Commission changing or modifying in any manner the rates of fare fixed and established in and by the franchises sold to plaintiff by the City of Los Angeles.

VI.

The court erred in making the decree and in fixing and/or allowing the charge and collection by plaintiff of rates of fare greater than and different from those fixed and established in and by the franchise-contracts entered into and existing between plaintiff and intervener-defendant City of Los Angeles, and in failing to hold that plaintiff was and is bound by all of the terms and provisions of said franchises, including the provisions for rates of fare, for the reason that said court did not and does not now possess jurisdiction to change or vary the said rates of fare so fixed and established.

VII.

The court erred in making the decree and in finding and/or holding that defendant Railroad Commission, either in and by its Decision and Order No. 9029, or otherwise, has ever acted to change the basic five-cent fare in force upon plaintiff's street railway system, for the reason that the record herein discloses upon its face that said decision and order never did and never has become an effective decision and order of said Commission, and was and is ineffectual for any purpose whatsoever, and further for the reason that

the record discloses upon its face that the Railroad Commission has never made, issued or promulgated any order, decision or rule changing the rates of fare upon plaintiff's street railway system.

VIII.

The court erred in making the decree and in failing to hold that plaintiff entered into valid and binding contracts with the City of Los Angeles when it purchased its franchises and filed approved bonds for the faithful performance of all terms thereof.

IX.

The court erred in granting the decree and in failing to hold that plaintiff is bound by the rate provisions in each of its franchises purchased from the City unless or until said provision should be changed by lawful and effective order of the Railroad Commission; and in failing to hold that plaintiff under and by its said franchise-contracts limited itself to charging a basic five-cent fare, subject to change only by the police power of the state, as a part of its consideration for the grant to it of the right to operate a street railroad on the streets of said City.

X.

The court erred in making the decree and in finding and holding that defendant Railroad Commission had or has acted to change, alter or affect the rates fixed in and by the franchise-contracts, or any of them, entered into and existing between plaintiff and the City of Los Angeles.

XI.

The court erred in making the decree and in finding and holding that a failure and refusal by defendant Railroad Commission to change the rates fixed in and by the franchise-contracts entered into and existing between plaintiff and the City, either by its Decision

and Order No. 19,521, or otherwise, is either a complete or any exercise of that Commission's power over the rates specified in said franchises, for the reason that such failure and refusal to change said rates did not and could not operate to affect said rates, or any of them, in any manner, or to give the said court jurisdiction thereover.

XII.

The court erred in making the decree and in finding and holding that the denial by defendant Railroad Commission of plaintiff's application (No. 13,323) for authority to increase its rates of fare constituted such action or any action with regard to said rates as to give to said court any jurisdiction or authority over said rates.

XIII.

The court erred in making the decree and in finding and holding that the denial by defendant Railroad Commission of the application of plaintiff for increased rates in the proceedings which resulted in the prosecution of this cause "followed as it was and is by the necessary effect of enforcing the rate, was an exercise of jurisdiction and that a situation was created wherein the power of the federal court to enjoin, if confiscation is effected by the order, is ample," for the reason that no action was or has been taken by defendant Railroad Commission, which would operate to change or alter any of the rates fixed in and by the franchise-contracts entered into and existing between plaintiff and the City of Los Angeles.

XIV.

The court erred in making the decree and in holding that the federal court may exercise or force the exercise of the police power of a state either to change the terms of or to abrogate the franchises sold to plaintiff by the City of Los Angeles, or otherwise.

ARGUMENT.

The City relies on the following points in arguing that the court below erred in its decree:

I. The franchises in question are contracts.

II. The City had power to enter into such contracts, including the fixing of maximum charges.

III. It is immaterial that a rate for public service fixed by valid contract between a municipal corporation and a public service corporation may be confiscatory.

IV. The public utility can seek no relief from the courts, unless it secures a change of the franchise rates by order of the State Railroad Commission.

V. There was no change from the contract or franchise rate to a statutory or legislative rate due to the orders of the Railroad Commission, either under the 1921 or 1928 orders.

VI. The absence of California decisions upholding the power of the City to contract with reference to rates is immaterial.

I.

The Franchises in Question Are Contracts.

The franchises themselves exhibit an intention on the part of the parties thereto, namely, the City and the public utility company, to contract. Specimen franchises were introduced in evidence [R. 397-436]. Typical is Franchise Ordinance No. 2532 (N. S.) granted in 1894, providing, in part, as follows [R. 397]:

> "Provided, that in all cases where this franchise is granted over streets now occupied by other lines of

street railway owned by persons or corporations, whether named herein or not, that said W. D. Larabee, and his assigns, shall have the right to operate over any and all such tracks *in accordance with and limited only by the statutes of the state of California applicable thereto;* and in case the gauge of the tracks of said other persons or corporations shall not conform to the gauge of the tracks of said W. D. Larabee, or his assigns, then the said W. D. Larabee, or his assigns, shall be permitted to lay a third rail over the distance traversed by said two roads jointly." (Italics ours.)

"Section 3. *That the rate of fare for any distance along said road or its branches, one way, shall not exceed 5 cents for one passenger,* and shall transfer at connecting points on the lines of said grantee or his assigns or lines which said grantee or his assigns may operate so as not to return passengers in the general direction from which they came, and that persons under eighteen years of age who attend the public schools of said city, shall be required to pay but half fare, provided said pupils shall purchase their tickets in quantities of at least one dollar's worth at a time; such tickets to be available only between the hours of 8 a. m. and 6 p. m., in actual passage to and from school; and said grantee, or assigns, shall sell such tickets whenever requested to do so by a pupil who shall present a certificate from a teacher approved by the Superintendent of Schools of the City, that he or she is such pupil of said schools.

"And, further, that said grantee, or assigns, shall carry policemen and firemen and letter carriers, Mayor and Councilman, free on said cars when on duty, subject at all times to the rules of the road.

"Provided, further, that said grantee, or assigns, shall, on or before December 15th, of each year, pay

to the City Tax and License Collector, the annual license upon each car fixed by the existing ordinances of said city.

"Section 4. The above rights and privileges are granted upon the express condition that work upon that portion known and described as the Kuhrts-Street Line of said road and the line from Estrella Avenue to the west city limits on Washington Street shall be commenced within sixty days, and completed, equipped and in operation as an electric road for its full length within eight months from the date hereof. The remaining portion of said railroad line shall be fully equipped and completed as provided herein within two years from the date of the approval of this ordinance. *Provided, further, that this franchise is granted upon each and every condition herein set forth, and a failure to comply with each or any of said conditions shall work an immediate forfeiture of all the rights herein granted.*

"Section 5. *The said grantee or assigns is hereby required to file a written acceptance of the terms and conditions hereof* with the City Clerk of said City within thirty days after the passage of this ordinance, together with a bond of not less than ten thousand dollars, for the faithful carrying out of the terms of this franchise." (Italics ours.)

Sections 22 and 23, Article XII, of the State Constitution of 1879 originally provided for the creation of the Railroad Commission, but no powers were given it over street railways in municipalities. These sections were amended in 1911, and it was held that the powers of control over existing public utilities which were vested in any city at the time of the adoption of the amendment were still retained by such city and did not pass to the Railroad

Commission until the city, by an election, surrendered these powers to the Commission. (*Title Guar. etc. Co. v. R. R. Comm.*, 168 Cal. 295, 142 Pac. 878.)

So, also, in 1903 (Stats. of 1903, p. 172) section 501 of the Civil Code had been enacted, reading as follows:

> "The rates of fare on the cars must not exceed ten cents for one fare for any distance under three miles, and in municipal corporations of the first class must not exceed five cents for each passenger per trip of any distance in one direction, either going or coming, along any part of the whole length of the road or its connections. The cars must be of the most approved construction for the comfort and convenience of passengers, and provided with brakes to stop the same, when required. A violation of the provisions of this section subjects the corporation to a fine of one hundred dollars for each offense."

On November 3, 1914, section 23 of Article XII of the State Constitution was further amended and regulation over the rates of public utilities was expressly reserved to the Railroad Commission, and municipalities were expressly divested of all power of regulation over rates.

The section, in part, now reads as follows (Art. XII, Sec. 23, as amended Nov. 3, 1914):

> "* * * From and after the passage by the legislature of laws conferring powers upon the Railroad Commission respecting public utilities, all powers respecting such public utilities vested in boards of supervisors, or municipal councils, or other governing bodies of the several counties, cities and counties, cities and towns, in this state, or in any commission created by law and existing at the time

of the passage of such laws, shall cease so far as such powers shall conflict with the powers so conferred upon the Railroad Commission; provided, however, that this section shall not affect such powers of control over public utilities as relate to the making and enforcement of local, police, sanitary and other regulations, other than the fixing of rates, vested in any city and county or incorporated city or town as, at an election to be held pursuant to law, a majority of the qualified electors of such city and county, or incorporated city or town, voting thereon, shall vote to retain, and until such election such powers shall continue unimpaired; but if the vote so taken shall not favor the continuation of such powers they shall thereafter vest in the railroad commission as provided by law; and provided, further, that where any such city and county, or incorporated city or town, shall have elected to continue any of its powers to make and enforce such local, police, sanitary and other regulations, other than the fixing of rates, it may, by vote of a majority of its qualified electors voting thereon, thereafter surrender such powers to the Railroad Commission in the manner prescribed by the legislature; and provided, further, that this section shall not affect the right of any city and county, or incorporated city or town, to grant franchises for public utilities upon the terms and conditions and in the manner prescribed by law. * * *"

Prior to the creation of the Railroad Commission, under the State Constitution the City of Los Angeles had been granted a charter by the state in 1850. (Stats. 1850, p. 155.) In 1889 a new charter was adopted (Stats. 1889, p. 455), which was amended in 1905 (Stats. 1905, p. 980), adding a new subdivision to sec-

tion 2 of Article I, numbered 25, which read as follows (at p. 994):

"That Section 2 of the charter be amended by adding a subdivision to be numbered (25) and to read as follows:

"(25). No franchise, right or privilege in, on, through, across, under or over any street, avenue, alley, bridge, viaduct or other public place, and no other franchise whatever granted by the city to any corporation, association or individual, shall be granted except by an ordinance passed by vote of two-thirds (2/3) of the whole council, nor for a longer period than twenty-one years. *Such grant and any contract in pursuance thereof* shall provide that at the option of the city, declared not more than three (3) years nor less than six months before the termination of such grant, the plant and property, if any, belonging to or used by the grantee, or his or its successors in interest, in the streets, avenues and other public places shall, at the termination of said grant, upon the payment of a fair valuation thereof, be and become the property of the city; but the grantee shall be entitled to no payment because of any valuation derived from the franchise. Provided, however, that such option shall not be exercised unless at the time of exercising the same the city shall be authorized and empowered to acquire and operate such plant and property. Every grant shall specify the mode of determining any valuation therein provided for and the time and mode of payment, *and shall make adequate provision by way of forfeiture of the grant or otherwise to secure efficiency of public service at reasonable rates and the maintenance of the property in good order throughout the term of the grant.*"

In 1911 the 1905 amendment above quoted was further amended and the city was given express power (Stats. 1911, pp. 2051, 2063):

> *"to fix and determine the rates or compensation to be collected by any person, firm or corporation, for water, gas, electric current, refrigeration, heat, light, power, telephones, telephone service or connections, or the conveyance of passengers or freight, by means of street railway cars, hacks, cabs, or other cars or vehicles for hire,* or for the products of, or service by, any other public utility operated or conducted within the city limits; and to prescribe the character and quality of any public utility service.
>
> "To regulate, subject to the provisions of the constitution of the state of California, the construction and operation of railroads, interurban railroads, street railways, or other means of transportation, conduits, waterworks, and works or plants for the production, transmission or distribution of gas, electricity, heat, refrigeration or power, and the works or plants of any other public service utility."

The franchise ordinances in question enacted by the City of Los Angeles provided, among other matters, that the grantee may operate in accordance with and limited only by the statutes of the State of California applicable thereto; that the rate of fare for any distance shall not exceed five cents for one passenger; that the franchise is granted upon each and every condition set forth in the instrument; that a failure to comply with each and any of the conditions of the franchise would work an immediate forfeiture of all the rights granted; and that said grantee is required to file a written acceptance of the terms and conditions of the said franchise with the City Clerk

of said city, together with a faithful performance bond of a specified amount [R. 397].

By the Franchise Act of 1893 (Stats. 1893, p. 288) a definite plan for the sale of franchises to construct or operate railroads upon the public streets of a municipality was set forth by the legislature. That act read as follows:

> "Section 1. Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate railroads along or upon any public street or highway, or to exercise any other privileges whatever hereafter proposed to be granted by the Board of Supervisors, Common Council, or other governing body of any county, city and county, city, town or district within this state, shall be granted upon the conditions in this Act provided, and not otherwise. The fact that an application for such franchise or privilege has been made to such Board of Supervisors, Common Council, or other governing or legislative body, together with a statement that it is proposed to grant the same, must first be advertised in one or more daily newspapers of the county, city and county, city, town, or district wherein the said franchise or privilege is to be exercised. Such advertisement must continue every day for at least ten days, and must commence at least thirty days before any further action of the Board of Supervisors, Common Council, or other governing or legislative body. The advertisement must state the character of the franchise or privilege proposed to be granted, the term of its continuance, and, if a street railroad, the route to be traversed, and the day on which tenders will be received for the same. On the day so stated, the Board, or other governing or legislative body herein mentioned, must meet in open ses-

sion and read the tenders. The franchise or privileges must then be awarded to the highest bidder: provided, however, that nothing in this section shall affect a special privilege granted for a shorter term than two years."

Prior to that time no definite scheme for the sale of franchises to the highest bidder had been provided by the Legislature.

In 1901 a new franchise act was enacted (Stats. 1901, p. 265), which dealt with the same subject. Thereafter, in 1905 (Stats. 1905, p. 777), an entirely new act was adopted, known as the Broughton Franchise Act, which repealed the former acts. This later act was amended in 1909 (Stats. 1909, p. 125) and in 1915 (Stats. 1915, p. 1300). By the 1915 amendment it was expressly provided as follows:

"Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate street or interurban railroads upon any public street or highway, to lay gas pipes for the purpose of carrying gas for light, heat, or power, to erect poles or wires for transmitting electricity for light, heat or power, along or upon any public street or highway, or to exercise any other privilege whatever hereafter proposed to be granted by boards of supervisors, boards of trustees or common councils, or other governing or legislative bodies of any county, city and county, city or town within this state, except steam railroads and except telegraph or telephone lines doing an interstate business, and renewals of franchises for piers, chutes or wharves, shall be granted upon the conditions in this act provided, and not otherwise. *The grantor may, however, in such franchise impose such other and additional terms*

and conditions not in conflict herewith, whether governmental or contractual in character, as in the judgment of the legislative body thereof are to the public interests."

There is no particular need of going into these various changes—suffice it to say that since 1893 the city in granting franchises has been, by legislative fiat, required to sell the franchises granted by it for the use of its streets. Ever since that time such franchises have been sold. It will be seen that under the act the method by which a sale is made is comparatively simple. An application is made for a franchise. The city advertises that it will make a sale of the franchise for which application is made. In the notice of sale is set forth all the terms and conditions upon which the franchise will be sold and the rights granted. The franchise is awarded to the highest bidder and an ordinance is then passed giving the rights to the purchaser, which ordinance contains all of the terms and conditions upon which the rights sold may be enjoyed upon acceptance by the grantee.

With these provisions of the constitution and laws of the State of California in effect at the time the franchises were granted, together with the charter provisions of the City of Los Angeles, we maintain that under the following authorities the franchises were contracts:

It was said by this court in *St. Cloud Pub. Serv. Co. v. City of St. Cloud,* 265 U. S. 352, 68 L. Ed. 1050, that:

> "Provisions in ordinances granting franchises to street railway companies that the rate of fare shall not be more than five cents, or that the grantee shall

not charge a higher fare, are contractual. (Detroit v. Detroit Citizens St. R. R. Co., 184 U. S. 368; Cleveland v. Cleveland City R. R. Co., 194 U. S. 517; Cleveland v. Cleveland Elec. R. R. Co., 201 U. S. 529; Ga. R. & Power Co. v. Decatur, 262 U. S. 434.)"

In *Madera Water Works v. City of Madera,* 185 Fed. 281, the California law was construed and it was therein stated:

> "Complainant's franchise to occupy and use the streets of the city of Madera must necessarily rest in a grant from the state. * * * All efforts, therefore, to pitch the controversy on any other than a contractual plane must be unavailing."

In *City of San Diego v. Kerckhoff,* 49 Cal. App. 473, the city had brought an action to recover on a bond given to insure the performance of the terms of a franchise granted by the city for the construction of a railroad. The court said (at p. 481):

> "The franchise of a street railroad finds its origin in the action of the municipality. It is a contract between the city and the grantee."

In *City of Albany v. U. S. Fid. & Guar. Co.,* 38 Cal. App. 466, the city brought action to recover upon a bond for failure to construct a railroad in accordance with the terms of the franchise. The court said:

> "At the instant of the grant of the franchise the franchise became an irrevocable contract. * * *"

In *St. Helena v. San Francisco, etc. Ry.,* 24 Cal. App. 71, it was said:

"It is not disputed that said franchise constitutes a contract that is binding upon both parties. * * *"

A petition for hearing was filed in the Supreme Court, wherein it was denied, the Supreme Court stating:

"Such power (the police power) must be founded upon the contract between the city and company whereby the franchise is granted, or upon some valid contract obligation of the company. * * * It (the paving of the street) is a constituent part of the contract granting the franchise, though not expressed therein in terms. The company is therefore bound by contract to pave the street in accordance with the city ordinance. * * *"

In *Los Angeles Ry. Co. v. City of Los Angeles*, 152 Cal. 242, the question of the forfeiture of a franchise granted to plaintiff by the City was involved. An action was brought by the Railway Company to enjoin the defendant City from interfering with the railroad in exercising its alleged franchise rights, after it had failed to construct a part of its road in accordance with the terms of this franchise contract. The court stated:

"It is argued in support of this view that nothing is involved in this controversy beyond the respective rights of the plaintiff and defendant growing out of and dependent upon the ordinance granting the franchise which it is contended embraces all the terms of the contract. * * * We agree with the appellant that the rights of the parties are measured by the terms of their contract. * * *"

In fact, it is not seriously disputed that the franchises are contracts, and the court below in effect admitted that they were in its statement—

"that even upon the assumption that the city had power to fix the utility rate by contract, *and that the rate provisions contained in the franchise granted to plaintiff did constitute contracts,* nevertheless the rates specified in the provisions of the franchise have been changed by the exercise of the police power of the state." [R. 542.] (Italics ours.)

II.

The City Had Power to Enter Into Such Contracts, Including the Fixing of Maximum Charges.

The court below, on this point, stated:

"The city would avoid the applicability of these general principles by contending that, although admitting the franchise rates are subject to change by the State Railroad Commission, nevertheless, the franchises are contracts between the parties, and that, therefore, no substantial federal question is presented, and the federal court is without jurisdiction to grant plaintiff the injunctive relief it asks. Briefly answering this contention, we think it may well be doubted whether the state of California ever delegated power to the city to contract with a public utility on the subject of rates so as to restrict future regulations." [R. 540.]

The principle may be stated that when a municipality, under and by reason of the state constitution, statutes and its charter, has clearly been granted the power to enter into a contract with a public utility as to rates, which contract is binding upon the parties thereto, and where the municipality has properly exercised that power, the contract is binding upon the parties until and when abrogated by the state, and until such contract is abrogated no question of confiscation arises. In such cases

the federal courts will not enjoin the enforcement of such contract rates at the request of the utility.

Thus, in *Columbus Ry. Co. v. City of Columbus*, 294 U. S. 399, 63 L. Ed. 669, the court said:

> "The authority under which the city acted came from the state and was granted by proper statutes passed for that purpose. The contracts were made between the city and the company and became mutually binding for the period named in the ordinances.
>
> "By these contracts, obligatory alike upon the city and the company, the city granted the right to use the streets and the company bound itself to furnish the contemplated service at the rates of fare fixed in the ordinances."

In *City of Opelika v. Opelika Sewer Co.*, 265 U. S. 215, 68 L. Ed. 985, it was held that whether or not a contract between a municipal corporation and a public service corporation is valid, under the laws of the state where they are located, is a question for the state courts to decide. That where the constitution of the state forbids grants of special privileges or immunities, the Legislature cannot make such a grant indirectly by giving power to a City to make it; but the Legislature, without constitutional power to make an irrevocable grant of privileges to a public service corporation, may yet confer power upon a municipal corporation to enter into a contract conferring such privileges so that the municipality cannot of its own motion recede from the grant.

In that case this court stated that the ordinance in question

"purported to be a contract, and that if it was a valid one, it bound the Sewer Company not to charge more than the prescribed rates. Columbus R. P. & Light Co. v. Columbus, 249 U. S. 399, 63 L. Ed. 669."

Section 2 of the Constitution of the state of Alabama, therein construed, provided that no law

"making any irrevocable or exclusive grants of special privileges or immunities shall be passed by the legislature and (that) every grant of a franchise privilege or immunity shall forever remain subject to revocation, alteration, or amendment."

That is a provision similar to the California constitution, which provides (Art. I, Sec. 21):

"No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislature."

In construing that provision of the Alabama constitution, this court said:

"We see no reason to doubt that the legislature, without impairing its power to revoke, may give a city power to make a contract from which the city of its own motion may not recede. * * * The Alabama decisions construe the state constitution and such charters (of municipalities) to allow a contract to be made, subject to being revoked, whenever the legislature of the state may think fit."

It was thereupon held that the ordinance prohibiting the Sewer Company from charging in excess of maximum rates therein contained was valid, on the theory

"that the city had the power to make the contract upon which it relies."

It is noteworthy in the *Opelika case* that the charter provisions referred to merely went to the extent that the City was given power

> "to maintain the health and cleanliness of the city, and to this end to adopt and maintain an efficient system of sewerage (Sec. 11);"

and

> "to establish and build drains, sewers * * * and to regulate the same."

Construing these sections this court said:

> "We shall assume that the city had power to make an arrangement with a company to do the work."

And even though the court stated that the charter provisions

> "do not go far enough to empower it (the city) to regulate prices charged by another, and, in short, we find no grant of that character elsewhere,"

nevertheless,

> "as we have said, the Alabama decisions sustain the conclusion that the city had the power to make the contract upon which it relies,"

and, therefore, the ordinance was valid and enforceable as to the rate provision.

So, also, in *St. Cloud Pub. Serv. Co. v. City of St. Cloud,* 265 U. S. 352, 68 L. Ed. 1050, this court stated that a state may authorize a municipal corporation to establish, by an inviolable contract, the rates to be charged by a public service corporation for a definite term, not grossly unreasonable in time, and the effect of such a contract is to suspend, during its life, the governmental

power of fixing and regulating rates; that charter authority to a municipal corporation to provide for, control and regulate the erection, maintenance and operation of gas works and regulate and prescribe the fees and rates to be charged for gas, includes power to contract for the rates to be charged, where the state courts have so construed it; that if a municipal corporation has power to contract for rates for public service and also to prescribe rates from time to time, the exercise of the power to contract suspends the power to regulate; that a contract fixing rates is established by acceptance of a municipal ordinance granting authority to construct a plant for producing gas with authority to charge a specified price for gas furnished.

A careful study of this case indicates the only limitation upon the doctrines enunciated is that the authority of the municipality to make a valid contract must clearly and unmistakably appear. However, the charter powers of the City of St. Cloud appear to have been no greater than the charter grant of 1905 to the City of Los Angeles. The material sections of the charter referred to in the decision provided that the City

> "shall be capable of contracting and being contracted with, and shall have all the powers possessed by municipal corporations at common law;"

that

> "the common council, in addition to all powers herein specifically mentioned, shall have full power and authority to make * * * all such ordinances for the general welfare of the city and the inhabitants thereof, as they shall deem expedient;"

that

> "the common council shall have full power, by ordinance, * * * to provide for and control the erection and operation of * * * works * * * *and to grant the right* to erect, maintain and operate such works * * * provided * * * that the common council shall have authority to regulate and prescribe the fees and rates and charges of any and all companies hereinbefore mentioned."

Contract this phrase "grant the right" with the Los Angeles Charter provision, "such grant and any contract in pursuance thereof." (1905 Amend. to City Charter, *supra*, p. 17.)

The court stated, in connection with these charter requirements:

> "In construing and giving effect to these provisions of the charter, we look to the decisions of the Supreme Court of the state. * * * In the light of these decisions of the Supreme Court of the state of Minnesota, we think it is clear that the city had authority, in 1905, under its charter and the laws of the state, to enter by ordinance into a contract * * * and we do not think that this contractual power was limited by the proviso that the council should have the right to 'regulate and prescribe' the rates and charges of the companies to which it might grant the right of constructing such works. *It is true that, standing alone, this proviso, in the absence of any state decision to the contrary, would, under the construction given similar language* in *Home Tel. Co. v. Los Angeles, 211 U. S. 274,* 53 *L. Ed. 183, be regarded as conferring authority merely to exercise the governmental power of regulating rates and not authority to enter into a contract.* In that case, however, it was pointed out

that there was no other provision of the charter authorizing the city to contract as to rates. And in the present case, as the other provisions of the charter give the city authority so to contract, we must regard the proviso as merely an alternative provision; that is to say, we think that the city might either contract as to the rates as an incident to its power of granting the right to construct and operate the public utility, or, if it did not exercise this power to contract, might thereafter 'regulate and prescribe' the rates in the exercise of the governmental authority conferred by the proviso. *One power, however, is not destructive of the other.* And where a municipality has both the power to contract as to rates and also the power to prescribe rates from time to time, if it exercises the power to contract, its power to regulate the rates during the period of the contract is thereby suspended and the contract is binding. Paducah v. Paducah R. Co., 261 U. S. 272, 67 L. Ed. 650, 43 Sup. Ct. Rep. 335." (Italics ours.)

In the California charter amendment of 1905 it will be noted that the City of Los Angeles was given power to grant franchises, provided that

> "every grant shall * * * make adequate provision by way of forfeiture * * * to secure efficiency of public service at reasonable rates * * * throughout the term of the grant."

We do not see how such grants, under the 1905 amendment, could be made effective, or construed, other than as a grant of the power *to contract*, and any other construction would render the charter provision abortive. Under no construction could this provision of the 1905 amendment be called merely regulatory of rates.

In 1891 the Legislature enacted a statute, which, in our opinion, gave the power to contract with reference to rates for street railways, such statute reading as follows (Stats. 1891, p. 12—amending Sec. 497 of the Civil Code):

> "Authority to lay railroad tracks through the streets and public highways of any incorporated city, city and county, or town, may be obtained for a term of years not exceeding fifty, from the Trustees, Council, or other body to whom is intrusted the government of the city, city and county, or town, under such restrictions and limitations, and upon such terms and payment of license tax, as the city, city and county, or town authority may provide. In no case must permission be granted to propel cars upon such tracks otherwise than by electricity, horses, mules, or by wire ropes running under the streets and moved by stationary engines, unless for special reasons in this title hereinafter mentioned; provided, however, that such board or body in granting the right, or at any time after the same is granted, to use electricity or any other of said modes, shall have power to impose such terms, restrictions, and limitations as to the use of streets and the construction and mode of operating such electric and other roads as may, by such board or body, be deemed for the public safety or welfare."

The Statute of 1891 above quoted did expressly give to cities power to grant franchises

> "under such restrictions and limitations and upon such terms * * * as the city * * * may provide * * *;"

and in the granting of such franchises to

> "impose such terms, restrictions and limitations as to the use of streets * * *, and * * * mode of

operating such * * * roads as may * * * be deemed for the public safety or welfare."

As confirming this position, that the Statute of 1891 did constitute a grant of power to contract with reference to rates, the Legislature March 21, 1872, had enacted a statute in the nature of a limitation of the power of municipalities to contract with reference to rates, in the following language, to-wit (Civil Code, Sec. 501):

> "The rates of fare on the cars must not exceed ten cents for one fare, for any distance under three miles. The cars must be of the most approved construction for comfort and convenience of passengers, and provided with brakes to stop the same, when required. The rate of speed must not be greater than eight miles per hour. A violation of the provisions of this section subjects the corporation to a fine of one hundred dollars for each offense."

However, section 501 of the Civil Code has been amended from time to time (from 1872 to 1903), and is still in force as amended in 1903, reading as follows:

> "Rates of fare on street-cars. Construction of cars. Penalty. The rates of fare on the cars must not exceed ten cents for one fare for any distance under three miles, and in municipal corporations of the first class must not exceed five cents for each passenger per trip of any distance in one direction either going or coming, along any part of the whole length of the road or its connections. The cars must be of the most approved construction for the comfort and convenience of passengers, and provided with brakes to stop the same, when required. A violation of the provisions of this section subjects the

corporation to a fine of one hundred dollars for each offense."

Furthermore, it will be noted that until the creation of the Railroad Commission there was an entire absence from the laws of the state and the charter provisions of the City of Los Angeles of any power to regulate or change rates. In other words, this entire absence of power is confirmatory of the express power given to the City to contract. This absence of power to regulate was commented upon in the case of *Water Light & Power Co. v. City of Hot Springs*, 274 Fed. 827. construing the law of South Dakota relative to franchises granted by the City fixing maximum rates for water and electricity. It was therein said:

> "In the case at bar these franchises do fix a maximum rate, and are contracts, because the franchises themselves do not reserve to the city future control of rates to be charged for service, nor do the statutes or constitution of the state of South Dakota under which the defendant acted in granting the franchises reserve to the city future control over such rates, nor is there any power in the statutes as they then existed given to the city to change these rates. *The relation between the plaintiff and defendant was and is therefore contractual and such a contract cannot be impaired by an amendment of the laws or the constitution.*" (Italics ours.)

The same case points out the distinction between the two classes of power residing in a municipality—one purely governmental in its nature and the other partaking of administrative or business nature. Commenting on this distinction the court said:

"To the first of those belongs the police power and in the exercise of such police power a city council can in no manner bind its successors; but a city has full power when authorized either by the constitution of the state or by legislative enactment to contract for the rendering of public service by individuals or private corporations, and in such contract fix the rates to be charged for such service. The granting of a franchise fixing a maximum rate is a contract and when the franchise itself does not reserve to the city future control of the rates to be charged for service or the constitution or statute under which the city acted in granting the franchise does not reserve to such city future control over such rates, including the power to change same, such franchise becomes a binding contract, no more subject to impairment than would be the contract of individuals."

We think this decision of the District Court is fully in accord with the doctrine laid down by this court in cases construing franchises granted by a city fixing maximum rates for service.

There is a line of cases, to be sure, exemplified by:

Denney v. Pac. Telephone & Tel. Co. (1928), 276 U. S. 97, 72 L. Ed. 483;

San Antonio Traction Co. v. San Antonio Pub. Serv. Co., 255 U. S. 547, 65 L. Ed. 777;

Miss. R. R. Comm. v. Mobile & Ohio R. R. Co., 244 U. S. 388, 61 L. Ed. 1216;

Augusta-Aiken Ry. & Elec. Corp. v. R. R. Comm., 281 Fed. 977;

Smith v. Ill. Bell Tel. Co., 270 U. S. 587, 70 L. Ed. 747;

Muscatine Lighting Co. v. City of Muscatine, 255 U. S. 539, 65 L. Ed. 764;

(and cases therein cited)

which hold, in effect, that municipalities have no power to enter into contracts fixing maximum charges for public service, but an analysis of these cases will show one of three things: either (1) that under the local law of the state the particular city had no power to enter into such contracts; or (2) that the court was not construing the franchise rate but was construing what had always been a statutory rate; or (3) what had originally been a contract rate had been changed to a statutory rate. This is clearly indicated in the *Denney case,* where the rate involved had been fixed by the Postmaster General in 1919 when the utility was under federal control, and the franchise rate had been abrogated. Later, in 1923, the Department of Public Works of the state of Washington, pursuant to statutory authority, approved as just and reasonable the rates fixed by the Postmaster General in federal control in 1919, which rates were of a higher level than those provided in the contracts.

So, also, in the *San Antonio case* this court stated that the powers of the city to contract cannot be implied. Therefore, in effect, there was no contract rate.

In the *Mississippi R. R. Comm. case* the court dealt with six direct orders of the Commission directing passenger trains to be restored to service. Their orders were, of course, not contractual, but statutory.

In the *Augusta-Aiken case* the record "disclosed no contractual relations between the company and the state."

In the *Smith case* the court again was dealing with rates fixed by the State Commerce Commission.

In the *Muscatine case* this court particularly emphasized the distinction in saying:

> "It follows that as the rates here involved are conceded to be confiscatory, they cannot be enforced, *unless they are secured by a contract obligation.*" (Italics ours.)

These cases are all illustrative of the distinction which we think is most plain.

It was also argued in the court below that Article I, Section 21 of the State Constitution, providing that

> "No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislature * * *"

prohibits the city from granting franchise contracts with limitations upon maximum rates. In short, that such franchises cannot be valid contracts because the city had no power under the constitutional prohibition to bind itself. The authorities relied upon were

City of San Antonio, supra; and
City of Denver v. Stenger, 277 Fed. 865.

We think, however, that the distinction is plain that the power of regulation could always be exercised by the state, but until exercised, as we shall hereinafter show in our argument under the next heading, the franchise maximum charge was binding upon the utility. In the cases relied upon *contra* the court was not discussing a contract or franchise rate, as it had held that the municipality had no power under the laws of the state to contract. In fact, this point was directly passed upon by this court in *Opelika v. Opelika Sewer Co.,* 265 U. S. 215, where the contract was sustained as binding *between the parties,* even though subject to revocation or alteration by the state. This court said (at p. 218):

"But we see no reason to doubt that the legislature, without impairing its power to revoke, may give a city power to make a contract, from which the city, of its own motion, may not recede. The city has not attempted to recede from it."

In concluding our argument on this point, we maintain that the City had express power, and now possesses such power, to enter into franchise contracts, subject to the paramount power of the state to regulate rates therein, pursuant to the following laws of the state:

1. By Section 497 of the Civil Code, enacted in 1891 (Stats. 1891, p. 12);
2. By the Franchise Act of 1893 (Stats. 1893, p. 288);
3. By the Broughton Franchise Act of 1901 (Stats. 1901, p. 265);
4. By the Franchise Act of 1905 (Stats. 1905, p. 777), as amended in 1909 and 1915 (Stats. 1909, p. 125; Stats. 1915, p. 1300);
5. By the Charter of 1889, as amended in 1905 (Stats. 1905, p. 980);
6. By the further amendment of the same section in 1911 (Stats. 1911, pp. 2051-2063);
7. By the Constitutional Amendment of 1914 (Art. XII, Sec. 23), which merely prohibits the "fixing of rates" by a city, but still permits the city "to grant franchises for public utilities upon the terms and conditions and in the manner prescribed by law."

III.

It Is Immaterial That a Rate for Public Service Fixed by Valid Contract Between a Municipal Corporation and a Public Service Corporation May Be Confiscatory.

This proposition is so well established by the decisions of this court that only the briefest citation of authority is necessary.

It was said in *St. Cloud Pub. Serv. Co. v. St. Cloud*, 265 U. S. 352, 68 L. Ed. 1050, that

> "Where a public service corporation and a municipality have power to contract as to rates and exert that power by fixing the rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and the question whether they are confiscatory is immaterial. So. Iowa Elec. Co. v. Chariton, 255 U. S. 539, 65 L. Ed. 764, and cases there cited; Paducah v. Paducah R. Co., 261 U. S. 267, 67 L. Ed. 647; Ga. R. & Power Co. v. Decatur, 262 U. S. 432, 67 L. Ed. 1065."

To the same effect is *Columbus Ry. P. & L. Co. v. City of Columbus*, 249 U. S. 399, wherein it was said that ordinances passed by the city of Columbus under authority of certain laws of Ohio and accepted by street railway companies constituted binding contracts to furnish street railway service for twenty-five years, at specified rates, in return for the use of the streets, and were not permissive franchises which the grantees might surrender when they ceased to be unremunerative.

In *Cleveland v. Cleveland City Ry. Co.*, 194 U. S. 517, it was said:

"In reason, the conclusion that contracts were engendered would seem to result from the fact that the provisions as to rates of fare were fixed in ordinances for a stated time and no reservation was made of a right to alter; that by those ordinances existing rights of the corporations were surrendered, benefits were conferred upon the public and obligations were imposed upon the corporations to continue those benefits during the stipulated time. When, in addition, we consider the specific reference to limitations of time which the ordinances contained, and the fact that a written acceptance by the corporations of the ordinances was required, we can see no escape from the conclusion that the ordinances were intended to be agreements binding upon both parties definitely fixing the rates of fare which might be thereafter charged."

To the same effect are *Detroit v. Detroit etc. Ry. Co.*, 184 U. S. 368, and *Henderson Water Co. v. Corp. Comm.*, 269 U. S. 278, 70 L. Ed. 273.

IV.

The Public Utility Can Seek No Relief From the Courts Unless It Secures a Change of the Franchise Rates by Order of the State Railroad Commission.

As we have pointed out, the State Railroad Commission refused to grant any change of rates to the Company in its instant application (Order No. 19,521). It is true that the Railroad Commission, on May 31, 1921, issued an intermediate, permissive order authorizing a basic six-cent rate, but that order never became effective and was never acted upon by the parties. The final order in said matter was one of dismissal, granted at the request of

the Company, dismissing the entire proceeding and revoking the intermediate, ineffective order. [R. 349-350.]

Conceding that after the constitutional amendment of 1914 the State Railroad Commission would have the power to change the franchise contract rates, nevertheless, it has been held by this court that where no action is taken by the State the contract rates remain in full force and effect.

Thus, it was said in *Henderson Water Co. v. Corporation Commission, supra* (269 U. S. 278):

> "The present case differs from the cases cited, in that when the water company applied to the corporation commission for an order increasing rates, it was bound by the terms of a contract with the city contained in its franchise to furnish water at a low schedule of rates fixed therein. It was not entitled to any judicial relief from this situation, however inadequate the rates. Columbus R. L. & P. Co. v. Columbus, 249 U. S. 399, 63 L. Ed. 699; St. Cloud Pub. Serv. Co. v. St. Cloud, 265 U. S. 352, 68 L. Ed. 1050. *Only by securing the waiver of the franchise rates by order of the corporation commission, speaking for the state, did the water company have any standing to ask for a fixing of rates in excess of the franchise rates.* Trenton v. N. J., 262 U. S. 182, 67 L. Ed. 939." (Italics ours.)

So, also, in *Milwaukee Elec. Ry. v. Wisconsin R. R. Comm.*, 238 U. S. 174, this court quoted with approval from *Manitowoc v. Manitowoc & N. T. Co.*, 145 Wis. 13, to the following effect:

> " 'No specific authority having been conferred on the city to enter into the contract in question, the right of the state to interfere whenever the public

weal demanded was not abrogated. *The contract remained valid between the parties to it until such time as the state saw fit to exercise its paramount authority, and no longer.* To this extent, and to this extent only, is the contract before us a valid subsisting obligation. It would be unreasonable to hold that by enacting section 1862, Stats. (1898), or section 1863, Stats. (Supp. 1906, Laws of 1901, Ch. 425), the state intended to surrender its governmental power of fixing rates. That power was only suspended until such time as the state saw fit to act.'" (Italics ours.)

In *Lenawee County Gas & E. Co. v. City of Adrian,* 209 Mich. 52, 176 N. W. 590, it was said that in the absence of the exercise by the state of its legislative power to fix rates, an ordinance of a city in whose streets a gas company lays its pipes, fixing rates and *accepted* by the company, constitutes a binding contract, and that such a contract is not subject to control of the State Utilities Commission.

So, also, in *Southern Utilities Co. v. City of Palatka,* 268 U. S. 232, 69 L. Ed. 930, this court said:

"The supreme court (state of Florida) held that the city had power to grant the franchise and to make the contract, and that it had no power, of its own motion, to withdraw, but it concedes the unfettered power of the legislature to regulate the rates. On that ground the defendant contends that there is a lack of mutuality and therefore that it is free and cannot be held to rates that, in the absence of contract, it would be unconstitutional to impose. The argument cannot prevail. Without considering whether an agreement by the company in consideration of the grant of the franchise might not bind the company in some cases, even if it left the city

free, it is perfectly plain that the fact that the contract might be overruled by a higher power does not destroy its binding effect between the parties when it is left undisturbed. Ga. R. & Power Co. v. Decatur, 262 U. S. 432, 67 L. Ed. 1065; Opelika v. Opelika Sewer Co., 265 U. S. 215, 68 L. Ed. 985."

In *Pacific Telephone & Tel. Co. v. Whitcomb*, 12 Fed. (2d) 279, it was said:

"It cannot be doubted that where a franchise contract is entered into between a municipality and a public utility corporation, fixing rates to be charged by the latter for a not grossly unreasonable period of time, such rates are binding and enforceable, even though confiscatory of the property involved. St. Cloud Pub. Serv. Co. v. City of St. Cloud, 265 U. S. 352, 68 L. Ed. 1050. Nor can it be doubted that under the statutes of the state of Washington the department has the power to abrogate and cancel such franchise rates, if in a proper case it sees fit to do so. * * * *It may be conceded that the department was not obliged to grant any relief against the rates stipulated in the franchises, and that it could not by judicial action be compelled to do so.* Yet if it undertakes to terminate such rates, pursuant to its plain statutory powers, the rates substituted instead must be fair, just and reasonable, if the plain mandate of the statute defining its duties is to be obeyed. And when the substituted rates are challenged, they must be considered as statutory, not franchise, rates, and their character as being confiscatory, or not, must be measured by the principles of law applicable to such rates." (Italics ours.)

The case is particularly in point in the matter now before us, for the reason that the plaintiff here is attempt-

ing to attack the order of the Railroad Commission, as was done by the city there. However, the important distinction, in our opinion, is this, that in the Whitcomb case the state authorities had changed the contract rate to that of a statutory rate. In the instant case there is no such substitution.

In *Monroe v. Detroit M. & T. Shortline R. Co.*, 187 Mich. 364, 153 N. W. 669, the contention was made in behalf of the company that the State Utility Act operated as a revocation of any power the city might have had to regulate the service of the railroad by contract, or otherwise. Of this contention the court said:

> "It does not follow that because the contract may yield to the exigency of public necessity, when such exigency has been determined in a proper case and manner by competent authority that the respondent, a party to the contract, may ignore the contract obligation, plead the public or its own convenience as an excuse, and remit the relator to a commission for relief. On the contrary, it seems wholly reasonable that it should perform its contract obligations until relieved therefrom by competent authority."

V.

There Was No Change From the Contract or Franchise Rate to a Statutory or Legislative Rate Due to the Orders of the Railroad Commission, Either

(a) Under the May, 1921, Application and Order (Decision No. 9029); or,

(b) Under the March 26, 1928, Decision and Order (No. 19,521).

Under the first application of the plaintiff to the Railroad Commission, to which we will refer as the 1921

Application and Order, plaintiff pleads [R. 12, Allegation IV of the Amended Complaint] that:

> "In May, 1921, upon the application of plaintiff to the Commission for an investigation of its service and financial condition, and for an order authorizing it to so operate its system and change its rates that the income would be sufficient to pay the cost of the service, the Commission made a permissive order (Decision No. 9029) authorizing plaintiff, within thirty days, to increase its basic five-cent fare to six cents, and authorizing plaintiff to sell ten tickets or tokens, in blocks, at a total cost of fifty cents. * * * Said increase in fares was never charged and collected by plaintiff, for the following reasons * * *"

Plaintiff then pleads that this increase in fare was never put into effect, for the reasons that it desired to operate its system, if possible, so that it would be unnecessary to increase the five-cent fare, and because the late Henry E. Huntington, as principal owner and stockholder of the properties, desired to attempt to increase the earnings of the company by other means than the collection of a basic fare greater than five cents. [R. 12.]

Attached to plaintiff's amended complaint, Exhibit "D", in the concurring opinion of Commissioner Carr is the statement [R. 169]:

> "This is the second time this company has sought from the Commission authority to depart from the basic five-cent fare, which, with inconsequential exceptions, has prevailed on its Los Angeles system for many years, and to enter upon the unchartered sea of multi-coin fares.
>
> "In November, 1918, the company came before the Commission with a request that its service and

financial condition be investigated. This finally resulted, on May 31, 1921, in an order permitting the company to charge a six-cent fare, with ten tokens or tickets for fifty cents. (*Re* Los Angeles Ry. Corp., 19 C. R. C. 980) * * *.

"The company did not accept the increased fares authorized by this decision, and after a period of over five years, and on October 25, 1926, at the instance of the company, the Commission set aside and revoked its decision." (Italics ours.)

Notwithstanding the fact that the 1921 Application and Order is in effect not relied upon in any way by appellee, as shown by its pleading, the court below, nevertheless, preferred

"to rest our decision upon the ground that even upon the assumption that the city had power to fix the utility rate by contract, and that the rate provisions contained in the franchises granted to plaintiff did constitute contracts, nevertheless, the rates specified in the provisions of the franchises have been changed by the exercise of the police power of the state. It appears that in 1921 the Commission granted plaintiff company authority to increase its rates over the basic five-cent fare, which was then in force. There were in force and effect at that time 102 out of 116 franchises granted to plaintiff or its predecessors. Since May, 1921, fourteen other franchises have been granted. When the Commission, in 1921, made its order changing the basic five-cent fare, it authorized plaintiff to file with the Commission and put into effect, thirty days from the date of the order, a schedule of rates increasing the then present basic fare of five cents to six cents, and directed that tickets or tokens be put on sale. *That plaintiff company did not avail itself of the right to the increase does*

not affect the fact that the Commission exercised its exclusive jurisdiction to regulate rates by making and finding that the rates provided for in the franchises granted to plaintiff were inadequate and that the six-cent fare authorized was a just rate." (Italics ours.) [R. 542-543.]

The error in the conclusion of the court is manifest. To base its decision upon this 1921 "Order" the court below was forced to go beyond the pleadings and hold a "permissive order" as pleaded is obligatory upon the city in invalidating its franchises, notwithstanding the fact that this permissive order had never been put into effect or even been accepted by the utility. Even further facts are revealed by the record that manifestly indicate the erroneous conclusion of the court below. In the affidavit of H. C. Mathewson, Secretary of the Railroad Commission [R. 347-350], is shown that on June 20, 1921, within the period allowed by law, a petition for rehearing on said decision was filed by the utility, in which the lawfulness of the order was challenged. The petition for rehearing was set down for argument before the Commission and removed from the calendar at the specific request of respondent company. On October 13, 1926, respondent company addressed the following letter to the Commission [R. 349]:

"*In re* Application No. 4238.

Gentlemen:

The above application was dropped from the Commission's calendar upon our request on March 14th, 1922, and no further action has been taken in the matter since that date. In view of the entire change of conditions since 1918, when Application No. 4238

was filed by this company, we at this time request that your Honorable Commission dismiss Application No. 4238 and the matters supplemental thereto.

Very respectfully,

LOS ANGELES RAILWAY CORPORATION,
By (signed) G. J. Kuhrts,
Vice-President and General Manager.
GIBSON, DUNN & CRUTCHER,
By
S. M. Haskins,
Its Attorneys."

Thereafter, on October 25th, 1926, the Railroad Commission issued its Decision No. 17,526, providing as follows [R. 349]:

"ORDER SETTING ASIDE DECISION AND DISMISSING APPLICATION BY THE COMMISSION.

"Request having been made by applicant in the above-entitled matter for dismissal of this application, and good cause appearing for the granting of said request,

It is hereby ordered that the above-entitled application (being Application No. 4238) be, and the same is hereby, dismissed; and

It is hereby further ordered that Commission Decision No. 9029, heretofore rendered in the above-entitled matter, which decision has been suspended by virtue of the pendency of the petition for rehearing, be, and the same is hereby, set aside and revoked.

Dated at San Francisco, California, this 25th day of October, 1926.

H. W. BRUNDIGE,
C. L. SEAVEY,
EZRA W. DECOTO,
LEON O. WHITZELL,
Commissioners."

Furthermore, under the Public Utilities Act (Stats. 1915, p. 115, as amended (Deering's Genl. Laws of California, 1923, Vol. II, p. 2683)), no change in public utility rates is effective "except after thirty days' notice to the Commission and to the public, as herein provided (Sec. 15)"; nor "until * * * schedules of rates, fares, charges and classifications shall have been filed and published in accordance with the provisions of this act (Sec. 17)"; nor until schedules showing all rates and fares to be charged shall have been printed and filed with the Commission (Sec. 18). In fact, Section 17 of the Act prohibits any common carrier from engaging or participating "in the transportation of persons until its schedules of rates, fares, charges and classifications shall have been filed and published in accordance with the provisions of this act."

Furthermore, Section 27 of the Act provides:

> "No street or interurban railroad corporation shall charge, demand, collect or receive more than five cents for one continuous ride in the same general direction within the corporate limits of any city and county, or city or town, *except upon a showing before the commission that such greater charge is justified;* provided, that until the decision of the commission upon such showing, a street or interurban railroad corporation may continue to demand, collect and receive the fare lawfully in effect on November 3, 1914. * * *"

And Section 63 of the Act provides as follows:

> "(a) No public utility shall raise any rate, fare, toll, rental or charge or so alter any classification, contract, practice, rule or regulation as to result in an increase in any rate, fare, toll, rental or charge,

under any circumstances whatsoever, except upon a showing before the commission and a finding by the commission that such increase is justified. * * *"

A perusal of the act as a whole indicates clearly that no change in rates is effective until the provisions of the act have been complied with. We submit that a permissive order of such a nature is totally insufficient to constitute a change of rate, within the purview of the act.

Recapitulating, we submit and maintain that the 1921 Order was totally ineffective to change the franchise maximum rate, for the following reasons:

1. It was never acted upon by the public utility or any of the parties;

2. It was never put into effect upon plaintiff's system in any way;

3. It was abrogated and annulled by the Commission at plaintiff's own request before it could become effective;

4. It has never been treated by plaintiff as anything but a nullity, as its amended bill of complaint shows (plaintiff's first cause of action is predicated entirely upon the existence of franchise rates; and its second cause of action is predicated entirely upon the refusal of the Railroad Commission to change the franchise rates);

5. To rest the decision upon the 1921 order is going entirely outside the scope of the pleadings;

6. The change of rates was never effective under the Public Utilities Act.

Likewise, as the Commission refused to change the *franchise* rates in 1928, we have further proof that the public utility company admits that no change was contem-

plated or effective under the 1921 order. We have many decisions of this court, as well as of the courts of the individual states, that refusal of the Commission to act is not sufficient to change contract rates to statutory rates.

As this court said in the *Henderson Water Co. case, supra* (269 U. S. 278):

> "Only by securing the waiver of the franchise rates by order of the Corporation Commission speaking for the state did the water company have any standing to ask for a fixing of rates in excess of the franchise rates."

In the *City of Adrian case, supra* (209 Mich. 52, 176 N. W. 590), it was said:

> "That the contract 'though binding between the parties to it, in the absence of governmental interposition, is to be construed as having been entered into with reference to the right and power of the government *to assert and exercise* its inherent paramount authority.'" (Italics ours.)

So, also, in the Whitcomb case, *supra* (12 Fed. (2d) 279), it was held that if the state

> "undertakes to terminate such rates, pursuant to its plain statutory powers, the rates substituted instead must be fair, just and reasonable. * * * And when the *substituted rates are challenged,* they must be considered as statutory, not franchise, rates. * * *" (Italics ours.)

As we stated, appellee here is not making any attack upon the statutory rate but is solely concerned with enjoining the State Railroad Commission and the City from further continuance of the contract rates, and the entire theory of its case is not based on the 1921 order in any

way, but is based entirely on the fact that a continuance of the *franchise* rates is confiscatory of its property.

In the *City of Adrian case, supra, Moorehead v. Union Light, Heat & Power Co.* (District Court), 255 Fed. 920, was quoted with approval, to the following effect:

> " 'These cases all decide that in determining whether equitable relief should be granted with respect to a contract, the court must place itself in the position occupied by the parties at the time the contract was made and not at the time at which it was to be performed. If at the time it was made the contract was fair and free from fraud, mistake or imposition, parties must be left free to make their contracts, and it is the duty of the courts to enforce them as made. *The same doctrine has been applied to contracts between municipalities and public utility companies.*' " (Italics ours.)

In the *Southern Utilities Co. case, supra* (268 U. S. 232), it was said:

> "It is perfectly plain that the fact that the contract might be overruled by a higher power does not destroy its binding effect between the parties when it is left undisturbed."

In this regard, we maintain that the franchises continuously have been and now are "undisturbed."

We rely also on the *Whitcomb case, supra* (12 Fed. (2d) 279), where it was said:

> "It may be conceded that the department was not obliged to grant any relief against the rates stipulated in the franchise and that it could not by judicial action be compelled to do so."

And, also, the ruling in *Monroe v. Detroit etc. Shortline R. Co., supra* (187 Mich. 364, 153 N. W. 669), holding:

> "It does not follow that because the contract may yield to the exigency of public necessity * * * a party to the contract may ignore the contract obligation * * * and remit the relator to a commission for relief. On the contrary, it seems wholly reasonable that it should perform its contract obligations *until relieved therefrom by competent authority.*" (Italics ours.)

We submit that there has been no relief by competent authority from the contract rates, and the action filed by the plaintiff herein is based entirely upon an effort on its part to impair and abrogate the contracts in question through injunctive method.

In addition, we direct the court's attention to the fact that after exhaustive investigations made by the Railroad Commission the contract rates were held fair and reasonable, and its ruling in that regard in 1928 is to continue in effect such franchise or contract rates.

In conclusion, we might say that there are many cases, both in the state of California and the federal courts, holding that until paramount authority has intervened and modified franchises fixing rates, they must be recognized as valid and enforceable in the courts.

Thus, in *Henrici v. South Feather Land etc. Co.,* 177 Cal. 442, it was said:

> "The obligation to furnish water at the agreed rate was unlimited in time and continued until the rate was superseded by order of a public body vested with the power of regulating the service."

So, also, in *Southern Pac. Co. v. Spring Valley Water Co.*, 173 Cal. 291, it was said:

> "Where the rates for water devoted to public use have not been fixed by public authority, the person in charge of the use and the consumer may freely contract regarding the price of service and the manner of payment, and such contracts will be deemed valid by the courts and may be enforced by any appropriate mode. (Fresno Canal etc. Co. v. Park, 129 Cal. 437 (62 Pac. 87); Stanislaus W. Co. v. Bachman, 152 Cal. 725, 730 (15 L. R. A. (N. S.) 359, 93 Pac. 858); Leavitt v. Lassen Irr. Co., 157 Cal. 82, 90 (29 L. R. A. (N. S.) 213, 106 Pac. 404).) * * * The power to fix rates and regulate public service of water devoted to public use 'carries with it jurisdiction to determine the reasonableness of charges, irrespective of prior contracts, and to that extent such contracts may be reformed.' *But until such public authority has intervened and modified such prior contract it will be recognized as valid and enforced in the courts.* * * *" (Italics ours.)

So, also, in *Salt Lake City v. Utah L. & T. Co.*, 173 Pac. 556, it was said:

> "So long as the state does not interfere, the rates agreed upon between the parties and the street railway companies in the franchise ordinances are binding and enforceable."

In *Travers City v. Mich. R. R. Comm.*, 168 N. W. 481, it was said:

> "* * * The franchise contract * * * though binding between the parties to it, in the absence of governmental interposition, is to be construed as having been entered into with reference to the right and power of the government to assert and exercise its inherent paramount authority."

In *City of Manitowoc v. Manitowoc etc. Traction Co.*, 145 Wis. 13, 129 N. W. 925, it was said:

> "The contract remained valid between the parties to it until such time as the state saw fit to exercise its paramount authority. * * * It is contended that this law has superseded the contract involved in this suit, and that therefore the contract no longer has any binding force or effect. We do not think so. The statute worked no change in existing rates. It simply provided that all rates should be reasonable and left to the Railroad Commission the power to determine the fact as to whether or not a given rate was reasonable. * * * Until that determination is made the contract is in force. When it is made the contract is superseded, *if the rate is changed.* * * * The court cannot relieve the defendant from an improvident contract but the contract is of such a character in the present instance that the legislative branch of the government may in the interest of the public abrogate it. If, as is contended by counsel for the respondent, no contract was entered into and we were dealing with the ordinance as a legislative enactment pure and simple, *and not as part and parcel of a contract,* there might be good reason for the claim that it is superseded by chapter 362, Laws of 1905, without any affirmative action on the part of the Railroad Commission. But such is not the case before us." (Italics ours.)

That case was cited with approval by this court in *Milwaukee Elec. Ry. v. Wis. R. R. Comm.*, 238 U. S. 174.

VI.

The Absence of California Decisions Upholding the Power of the City to Contract With Reference to Rates Is Immaterial.

Counsel in the court below made frequent reference to the fact that no specific California decision could be pointed out wherein it was directly held that this city had the power to contract with street railway companies for rates.

We merely wish to call the court's attention to the fact that it is not an indispensable requirement or condition precedent that California decisions be pointed out upholding the power to contract, before this court may find that such power did, in fact, exist.

As illustrative of this doctrine, in the case of *Milwaukee Elec. Ry. & Light Co. v. R. R. Comm.*, 238 U. S. p. 174, this court used the following language:

> "* * * This court has repeatedly held that the discharge of the duty imposed upon it by the Constitution to make effectual the provision that no state shall pass any law impairing the obligation of a contract, requires this court to determine for itself whether there is a contract and the extent of its binding obligation, and parties are not concluded in these respects by the determination and decisions of the courts of the states."

It is clear, therefore, that even if there were decisions of the California Supreme Court (which there are not) to the effect that this City had not been given power by the state to contract to fix rates, this court could find otherwise. How much clearer it is, then, that where there has been no expression from the Supreme Court of the state with reference to the power to contract for rates, this

court has a duty to protect the obligation of a contract if it finds, under the record, that one existed.

Conclusion.

In concluding, we submit that the franchises in question are contracts; that the City had, and now has, express power, under the Constitution and laws of the state of California and the charter provisions granted to it, to enter into such contracts, and that the provisions therein limiting charges are valid and should be protected by the state and federal constitutional guarantees prohibiting the impairment of contracts; that it is immaterial that the limitation upon maximum rates in the franchises prohibiting the public utility from charging over five cents per passenger has become confiscatory (even if, in fact, the rates are confiscatory); that the plaintiff, appellee here, is in no position to seek relief from the federal courts, where the State Railroad Commission has refused to change the franchise rates and has left the public utility and the City as contracting parties in the same position in which they were at the time the contracts were entered into; that there has been no change of the franchise or contract rates to statutory or legislative rates by orders of the Railroad Commission; that the State Constitution does not prohibit the City from granting franchise contracts of the kind here in question, on the ground that they are special privileges or immunities, as they are subject to future regulation by the state; that the franchises themselves exhibit an intention to make binding and valid contracts between the City and the public utility; that if the appellee is entitled to any change in the franchise rates, it is only by virtue of an order to be made by the Railroad Commission, pursuant

to article XII, section 23, of the State Constitution, and the Public Utilities Act (Stats. 1915, p. 115, as amended); that these rights are statutory and not judicial; that as appellee has failed to pursue its statutory rights, or even to show that it is entitled to them, it has no standing in the federal courts to seek injunctive relief to abrogate its contracts with the City, on the ground that such contracts (willingly entered into by it) are confiscatory.

For these reasons, and upon the argument stated, we feel that the action of the court below in abrogating the rate fixed in the franchise contracts was in error, and the decree should be reversed.

Respectfully submitted,

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